IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AUGUST BAY,
Plaintiff in Error,
vs.
MERRILL & RING LOGGING CO., a corporotion,
Defendant in Error.

No. 2417

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR

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STATEMENT.

On the 21st day of October, 1912, August Bay was injured, while in the employ of the Merrill & Ring Logging Company, and engaged in loading logs on a flatcar in the woods in Snohomish County, Washington, where they had been cut preparatory to transporting them upon that car to the nearby waters of Puget Sound. Thereafter he instituted this action, alleging that his injuries were due to the negligence of the defendant in error, seeking to recover under the provisions of the Federal employers' liability

act (35 Stat. at L. 65, chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322, printed in full in 223 U. S. p. 6, 56 L. ed. 329, 38 L. R. A. [N. S.] 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875).

At the conclusion of the plaintiff's evidence motion was made for a directed verdict and the court entered a judgment on the grounds that it affirmatively appeared from the plaintiff's evidence that the Merrill & Ring Logging Company was not a common carrier and that neither the plaintiff nor the defendant was engaged in interstate commerce at the time of the happening of the accident. The evidence discloses the following facts:

The Merrill & Ring Logging Company, owning extensive tracts of timber in Snohomish County, Washington, is a corporation resident in that state. It is engaged solely in logging its own lands. As a part of its logging operations and as a necessary adjunct thereto, it has built and operates a standard gauge logging railroad. This road extends through its own timber and connects with the company's boom ground in Puget Sound. The operation of this railroad is a part of the logging business. The road is connected by switches with the Great Northern and Interurban roads, but those connections are used only for the purpose of bringing necessary supplies to the logging camps of the company. At no time has any shipment of logs or timber of any kind been sent over these switches. There was some evidence that a number of years prior to the happening of this accident a shipment of steel rails had gone over the

logging road for the Interurban which at the time was being constructed and which had no connections at either its Seattle or Everett terminals. The only charge made for that service was the actual expense of operating the locomotive, and the Interurban Company assumed all liability for damages on account of accidents occurring in this transportation. The Merrill & Ring Logging Company does not manufacture any of the logs which it carries down to the Sound, nor are any of them under contract by that company to be sold for foreign shipment or for any shipment at all. The logs are sold from the boom into which they are dumped from the cars. There they are rafted by the purchasers and towed away by tugs. The purchasers pay for them and take possession of them in the boom. Any loss occurring while they are being rafted away is that of the purchaser. Many of the logs are sold to nearby mills upon the Sound which are engaged in the manufacture of lumber, and this, as a finished product, is ultimately disposed of, in a large part, outside of the State of Washington.

The Merrill & Ring Company at times prior to the happening of this accident, had taken out some poles which were sold and delivered at its boom to a purchaser who resided and did business in Everett, Washington, and who, in turn, resold the poles for shipment to California, but the evidence shows that plaintiff was not engaged in loading any of these poles upon the train at the time of the happening of this accident.

ARGUMENT.

I.

A right to recover under the terms of this statute arises only when a common carrier by railroad is engaged in interstate commerce, and when the employe is employed by the carrier in such commerce. *Pederson v. Delaware, Lackawanna & Western Railroad Company,* 229 U. S. 146.

II.

The Merrill & Ring Company Is Not Engaged in Interstate Commerce.

The facts revealed by the record in this cause place upon the operations of the Merrill & Ring Company the impress of a strictly intrastate commerce. Their activities commenced and ended with the preparation of the product of the forest for a strictly local market. Their operations contemplated nothing more than the transportation of these logs from their own forest over their own land to their own boom. There that transportation ended so far as the defendant was concerned; there they were sold and the logging company's interest in them ceased. It was not a participant in any commerce of which they might subsequently become the subject matter. Whether they were afterwards started upon an interstate journey or whether they continued in intrastate commerce was a question with which the producing company had no concern. The logs were not delivered by them to a carrier whose service was the initial step in a foreign ship-

ment. The boom ground was the end of their journey—there they might lie for a day or a month; there the ownership of the purchasers attached and the interest of the Logging Company ceased. They were purchased by nearby mills in which they were to be subjected to processes of manufacture, and where the finished product might be sold as the subject of either interstate or intrastate commerce. Is not this the identical situation described in *Coe v. Errol,* 116 U. S. 517, 525?

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there."

And at page 528:

> "The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property

in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri,* and not at all a fixed and certain thing."

Under this pronouncement of the Supreme Court it must be said that the operations of the Merrill & Ring Company went no further than to gather these logs from the forest into a logging market, preparatory, if indeed it can even be said that so much was contemplated, to making them ultimately subjects of interstate commerce. Under the numerous decisions of the Supreme Court of the United States, the Merrill & Ring Company was engaged solely in a domestic commerce:

Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U. S. 403.

Bacon v. Illinois, 227 U. S. 504.

C. M. & St. P. Ry. Co. v. Iowa, U. S. Sup. Ct. Adv. Sheets, Vol. 34, No. 12, May 15, 1914, p. 592.
The Daniel Ball, 10 Wall. 557.
Co. v. Errol, 116 U. S. 517.
Diamond Match Co. v. Ontonagon, 188 U. S. 82.
Kelley v. Rhoads, 188 U. S. 1.
General Oil Co. v. Crain, 209 U. S. 211.

Counsel bases his contention to the contrary upon the cases of the *Railroad Commission of Ohio v. Worthington,* 225 U. S. 101; *United States v. Union Stock Yard & T. Co.,* 226 U. S. 286; *So. Pac. Terminal Co. v. Interstate Commerce Commission,* 219 U. S. 498; *Texas & New Orleans R. R. Company v. Sabine Tram Co.,* 227 U. S. 111.

Those cases, when carefully analyzed, will be found, however, to contain nothing which in any measure limits or modifies the rule announced in *Coe v. Errol,* 116 U. S. 517. They are, in fact, authorities which substantiate the contention of the defendant in this cause, and by their application determine the character of the commerce carried on by the Merrill & Ring Logging Company asdomestic and not foreign commerce. They but state and apply the converse of the proposition contained in *Gulf, Colorado & Santa Fe Ry. Co. v. Texas (supra).* Taken with that decision they enunciate only the rule that it is the service actually contemplated and the intention of the shipper, and not the mere evidentiary incidents, such as bills of lading, which must

ultimately determine the character of any particular movement in commerce. If we apply this rule to the facts of the present case, we find that the service contemplated by the Merrill & Ring Company was the transportation of these logs from one point within the State to another point within the State. It was the intention of the Merrill & Ring Company to deal with them only while they remained in the State; to terminate their interest in them before they departed from the boom; participation in the commerce of which these logs were the subject matter was to cease simultaneously with the attaching of the interest of any purchaser who might ultimately make them subjects of interestate commerce. The decision in *Texas & New Orleans R. R. Co. v. Sabine Tram Co.,* 227 U. S. 111, was rested largely upon the fact that there was no market for lumber at the point within the State to which the product had been shipped under a local bill of lading, while it appeared that the real market contemplated by the parties when the shipment was started was a foreign one. Here was a market at the boom ground and it was the only market wherein this defendant dealt with these logs as subjects of commerce. In the *Sabine Tram Company* case it was said that the parties never in fact intended that the shipment should end within the State. In the instant case there was never any intention to transport these logs beyond the point of delivery. It was the intention of the company to there part with all interest in them and deal with them no further than to make delivery to any purchaser who might buy them,

whether such purchaser proposed to ultimately start them upon a journey to another State or to deal with them in a strictly domestic commerce. If, therefore, it is the logic of the line of decisions cited by counsel as stated in *United States v. Union Stock Yard & T. Co.,* 226 U. S. 286, that the character of the service rendered determines the interstate or intrastate character of the commerce, these are authorities which will exempt the defendant in this cause from liability, for the essential character of the service here rendered was that of a logging road operated as a plant facility in a logging business contemplating transportation only from the forest to the boom ground.

Duluth-Superior Milling Co. v. Northern Pac. Ry. Co., 140 N. W. 1105.

Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U. S. 403.

III.

Defendant Is Not a Common Carrier.

The act by its terms is applicable only to common carriers by railroad. We submit that there is absolutely no evidence in the record upon which there could be rested a finding that this defendant was, at the time of the accident, engaged as such common carrier, within the meaning of the Federal employers' liability act. That enactment operates in derogation of the common law and while the courts will so construe it as to reasonably effectuate its purpose, it will not be extended by construction to cover any cases other than those clearly within its terms. Surely the trial court was right in finding that

this road, a mere adjunct to the logging business of the defendant, was not engaged as a common carrier. The road has never been used for any purpose other than that of transporting the logs of the Merrill & Ring Logging Company from its own forest to its own boom ground; no demand has ever been made upon it for services; it has never held itself out to the public as being so engaged; it has never, so far far as this evidence discloses, exercised any of the powers or enjoyed any of the privileges of a common carrier road.

> "A common or public carrier is one who, by virtue of his business or calling, undertakes, for compensation, to transport personal property from one place to another, either by land or water, and deliver the same, for all such as may choose to employ him." *Moore on Carriers,* p. 18, § 1, Chapter II.

It has been repeatedly held that a logging road, operated by a milling or logging company as a mere adjunct to a mill or logging camp, is not a common carrier.

> *Moore on Carriers,* § 35, p. 72.
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> *Wade v. Lutcher & Moore Cypress Lumber Co.,* 74 Fed. 517.
>
> *Eastern & Western Lumber Co. v. Rayley,* 157 Fed. 532.
>
> *E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co.,* 170 Fed. 240.
>
> *Ellington v. Beaver Dam Lumber Co.,* 19 S. E. 21.

Texas & P. Ry. Co. v. Henson et al., 121 S. W. 1127.

Straight Creek Coal Min. Co. v. Straight Creek Coal & Coke Co., 122 S. W. 842.

The only possible basis upon which counsel may rest his contention upon this phase of the case is the fact that among the powers enumerated in the charter of the Merrill & Ring Logging Company is the power to construct and maintain a common carrier road, and in the consummation of that purpose to exercise the power of eminent domain. But the company as a private corporation is also given the power to own and operate a logging railroad as an adjunct to its logging business. Under which of these powers is the company acting? Clearly it is acting by virtue of those powers which are granted to it as a private corporation. It does not appear that the Merrill & Ring Company has ever exercised the power of eminent domain; it has never held itself out to the public as a common carrier; no demand has ever been made upon it for services of that nature. It has never, in fact, acted as such. It has served one purpose only —that of a logging railroad, maintained as an incidental part of the business of logging extensive tracts of timber.

This Court is not called upon to determine the relation of the company to a person offering himself as a shipper or a passenger, nor the question of whether condemnation proceedings could be successfully re-

sisted on the grounds that the use to which the railroad is put is not a public one. The Supreme Court of the United States and the Federal appellate courts have frequently held that corporations standing in the relation of common carriers to the public as passengers or shippers do not occupy such relation when not in the exercise of their functions as a common carrier. They may by contract exempt themselves from liability due to negligence when acting otherwise than as common carriers. Surely in this instance the plaintiff was employed as a logger in the logging business of a private corporation, and the case falls within the rule of *Santa Fe Railway v. Grant Bros.,* 228 U. S. 177, wherein it was held that a transcontinental railroad, in dealing with the transportation of men and material in connection with the construction and improvement of its own road, was acting in its capacity as a private corporation and not as a common carrier. In the case of *Wade v. Lutcher & Moore Cypress Lumber Co.,* 74 Fed. 517, which has been approved and quoted by this Court, it was held that a constitutional provision similar to the one contained in our constitution, making all railroads within the State common carriers, did not make a company owning a logging railroad liable as a common carrier in a personal injury action.

The actual status of a railroad such as this one is fixed by the real and actual scope of its operations, and the fact that it has reserved and unexercised powers of a common carrier will not make it such

when it is acting outside the scope of the duty of a common carrier.

Santa Fe Ry. Co. v. Grant Bros., 228 U. S. 177.

Shade v. Northern Pacific Ry. Co., 206 Fed. 353.

Wade v. Lutcher & Moore Cypress Lumber Co., 74 Fed. 517.

The only evidence in this case is that adduced by the plaintiff and from that evidence it affirmatively appears that the Merrill & Ring Logging Company is not a common carrier by railroad; that it was not engaged in interestate commerce at the time of the happening of this accident and was not at that time employing this plaintiff in such commerce.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.